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No.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1992

JAMES HAROLD UNDERWOOD - - - - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the lower court erred in holding the Petitioner had the requisite scienter for the firearms enhancement under United States Sentencing Guidelines § 2D1.1(b)(1)?

2. Whether the Sentencing Guidelines contemplate the use of uncharged relevant conduct to enhance the statutory maximum penalty otherwise authorized by 21 U.S.C. § 841(b)(1)(D) for Petitioner's offense of conviction as charged?

a. If the Guidelines do not contemplate such use of uncharged relevant conduct, did the lower court err in constricting Petitioner's due process rights by declining to follow circuit precedent and eliminating the government's duty to allege in the indictment (count of conviction) the predicate quantity of marijuana necessary to trigger the enhanced statutory maximum penalty of life under 21 U.S.C. § 841(b)(1)(A)?

b. If the Guidelines do not contemplate such use of uncharged relevant conduct, does its extreme quantitative effect on Petitioner's sentence require heightened procedural protection under the Fifth and Sixth Amendments to the United States Constitution?

3. Whether the lower court erred in holding the district court did not abuse its discretion in failing to depart downward from the Sentencing Guidelines due to the mitigating circumstance of unjustifiably disparate sentences between Petitioner and his codefendants?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals decided and filed on December 24, 1992.

OPINION BELOW

The opinion of the Court of Appeals decided and filed on December 24, 1992 (Appendix A) is reported at 982 F.2d 426 (10th Cir. 1992). A petition for rehearing was filed en banc. The order of the Court of Appeals denying the petition for rehearing was entered on February 22, 1993 (Appendix B).

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was decided and filed on December 24, 1992; and a timely petition for rehearing was denied by order of the Court of Appeals for the Tenth Circuit (Appendix B) on February 22, 1993. This Court's jurisdiction is

invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Rule Court 13.4.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be...deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to...an impartial jury ...and to be informed of the nature and cause of the accusation...."

STATEMENT OF THE CASE

In November 1989, Petitioner was named in eight counts of a twelve count indictment relating to a marijuana growing operation on several farms throughout seven counties in the State of Kansas. In March 1990, Petitioner pled guilty to Count I charging conspiracy to grow and distribute an unspecified quantity of marijuana, a violation of 21 U.S.C. §§ 846 and 841(a)(1) for which a prison term of up to five years may be imposed under 21 U.S.C. § 841(b)(1)(D). The remaining counts in which Petitioner was named, most of which alleged the predicate quantity of marijuana necessary to trigger the applicability of the enhanced penalty provisions of § 841(b), were dismissed. Nevertheless, the quantities of marijuana charged in the dismissed counts were aggregated, as initially required for purposes of determining

Petitioner's base offense level under the guidelines, and then utilized to trigger the applicability of the enhanced penalty provisions of § 841(b)(1)(A).

Among other adjustments, Petitioner's base offense level was enhanced by two levels based on possession of a firearm during the offense. Petitioner was sentenced to 235 months imprisonment, far beyond the statutory maximum penalty of five years authorized by § 841(b)(1)(D) for his offense of conviction as charged. Several of his codefendants received far shorter terms of incarceration. Petitioner appealed his sentence.

On appeal, the Court of Appeals remanded with instructions to vacate Petitioner's sentence and resentence him stating the reasoning behind the calculation of the guideline range and making a finding as to whether Petitioner knowingly possessed weapons or whether the weapons possession by his codefendants was reasonably foreseeable. The district court reinstated its previous sentence after finding Petitioner had the requisite scienter for the firearms enhancement.

The district court also heard, but rejected, arguments by Petitioner that his sentence should not have been enhanced beyond the statutory maximum of five years and a downward departure from the guidelines was warranted due to the disparate sentences of his codefendants. [Please refer to opinion reproduced in Appendix A.]

REASONS FOR GRANTING THE WRIT

1. Whether the Lower Court Erred in Holding the

Petitioner Had the Requisite Scienter For the Firearms Enhancement Under Sentencing Guidelines § 2D1.1(b)(1)?

Petitioner respectfully submits the Court of Appeals erred in holding he had the requisite scienter for the firearms enhancement under United States Sentencing Guidelines (hereinafter referred to as U.S.S.G.) § 2D1.1(b)(1). The best evidence presented by the prosecution tying Petitioner to a firearm was testimony a rifle was found in his pickup truck. However, Petitioner's fingerprints were not found on the rifle, which is consistent with Petitioner's contention that he had no knowledge of any weapons involved in the marijuana operation. He contends the rifle was left in the truck by a relative who was not involved in the marijuana operation and had been placed under the seat, out of sight, without Petitioner's knowledge.

While firearms were found at five of the farms involved in the marijuana growing operation, no firearms at all were found at two. Thus, firearms were not an indispensable part of the business. Using fingerprints, the government was unable to link a single firearm to Petitioner. No evidence was introduced that any of the weapons were ever fired nor was any evidence introduced indicating the Petitioner was aware of the firearms.

The Court of Appeals held in the first appeal a § 2D1.1(b)(1) enhancement could be based on codefendants'

possession, if Petitioner knew of his codefendants' possession or such possession was reasonably foreseeable by Petitioner. See U.S. v. Underwood, 938 F.2d 1086, 1090 (10th Cir. 1991). It was also held that "reasonable foreseeability of weapons possession by a codefendant may be inferred if the codefendant knowingly possessed the weapon." Id.

The district court found Petitioner was aware of his codefendants' possession of firearms and such possession was reasonably foreseeable to Petitioner. The district court held the existence of the firearms was reasonably foreseeable to Petitioner in part because firearms "are an expected and usual accessory of the narcotics trade." The Court of Appeals acknowledged it had "difficulty finding any direct evidence of [Petitioner's] knowledge of his codefendants' possession of firearms." U.S. v. Underwood, 982 F.2d 426, 428 (10th Cir. 1992). Nevertheless, the Court of Appeals noted there was evidence Petitioner supervised and was seen at various farms where a number of firearms were found. Id. Most importantly, the Court of Appeals ultimately held, "Given the codefendants' knowing possession of firearms during the conspiracy, we can infer that the codefendants' possession was reasonably foreseeable to [Petitioner]." Id. (emphasis added). Petitioner contends, however, he did not serve as a supervisor of the marijuana operation, and there exists no evidence he supervised the particular codefendant who was in

possession of the firearm at the time of his arrest and no evidence was introduced Petitioner was seen at the particular farms where the firearms were found while the firearms were there.

The Court of Appeals erroneously suggests weapons possession should be attributed to all defendants in a drug prosecution when firearms are discovered during the investigation. See U.S. v. Khang, 904 F.2d 1219, 1223 (8th Cir. 1990). See also U.S. v. Rodriguez-Nuez, 919 F.2d 461 (7th Cir. 1990).

Petitioner should not be penalized merely because firearms were found during the investigation or a codefendant knowingly possessed one. On that basis alone, it would be totally unreasonable and arbitrary to infer the codefendants' possession of firearms was reasonably foreseeable to Petitioner. The effect of the Court of Appeals' position is to create an irrebuttable and impermissible presumption in violation of Petitioner's due process rights.

Thus, Petitioner respectfully submits review should be granted to overturn the burden shifting aspects of the Court of Appeals' holding regarding U.S.S.G. § 2D1.1(b)(1) as a violation of the Due Process Clause of the Fifth Amendment. Cf. Mullaney v. Wilber, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Review should be granted and the Court of Appeals' decision vacated because the Petitioner did not have the requisite scienter for the firearms enhancement under U.S.S.G. § 2D1.1(b)(1).

2. **Whether the Sentencing Guidelines Contemplate the Use of Uncharged Relevant Conduct to Enhance the Statutory Maximum Penalty Otherwise Authorized by 21 U.S.C. § 841(b)(1)(D) for Petitioner's Offense of Conviction As Charged?**

Petitioner respectfully submits the Court of Appeals erred in its legal conclusions with respect to, and has thus endorsed an unconstitutional application of, the relevant conduct provisions of the sentencing guidelines. Not only is its decision in conflict with decisions of every other circuit which has addressed the issue, but it is also in conflict with decisions of the same court on the same matter and with the analogously applicable pre-guidelines decisions of this Court.

As noted above, Petitioner pled guilty to Count I of the indictment, charging conspiracy to grow and distribute an unspecified quantity of marijuana. The remaining counts in which Petitioner was named were dismissed. Nevertheless, the quantities of marijuana charged in the dismissed counts were aggregated, as initially required for purposes of determining Petitioner's base offense level, and then utilized to trigger the enhanced statutory maximum penalty under 21 U.S.C. § 841(b)(1)(A). Thus, uncharged conduct was utilized, pursuant to the relevant conduct provisions of the guidelines, to enhance the statutory maximum penalty otherwise authorized by 21 U.S.C. § 841(b) for Petitioner's offense of conviction as charged.

In U.S. v. Crockett, 812 F.2d 626, 629 (10th Cir. 1987), it was held the defendant's sentence could not exceed the statutory maximum of five years because the government failed to allege in the indictment (count of conviction) the predicate quantity of marijuana necessary to trigger an enhanced statutory maximum penalty under the former version of § 841(b). Crockett stands for the proposition that the statutory maximum penalty as authorized by § 841(b) is based on the offense of conviction as charged. Accord U.S. v. Brandon, 847 F.2d 625, 631 (10th Cir. 1988); U.S. v. Jenkins, 866 F.2d 331, 334 (10th Cir. 1989).

Relying upon the statutory rule of Crockett, Petitioner argued that because Count I of the indictment failed to allege the predicate quantity of marijuana necessary to trigger the enhanced statutory maximum penalty of life under 21 U.S.C. § 841(b)(1)(A), the maximum penalty as authorized by § 841(b) for his offense of conviction as charged was only "five years...under § 841(b)(1)([D])." Crockett, supra, 812 F.2d at 629. Indeed, "[t]he [Petitioner] was entitled to and did plead guilty only to the charges on which he had been formally indicted." Id. Thus, Petitioner argued, under the guidelines the district court's discretion was limited to imposing the statutory maximum sentence of five years under the unenhanced provisions of § 841(b)(1)(D). See U.S.S.G. § 5G1.1(a) (a guideline sentence may not exceed the statutory maximum for the offense of conviction). Alternatively,

Petitioner argued utilizing uncharged conduct to enhance the statutory maximum penalty otherwise authorized for the offense of conviction as charged constitutes an unconstitutional application of the relevant conduct provisions of the sentencing guidelines requiring heightened procedural protection.

In response to the first aspect of Petitioner's argument, the Court of Appeals held "Crockett and its progeny are pre-guidelines cases which we have held are 'inapposite to post-guidelines cases.'" Underwood, 982 F.2d at 429 (quoting U.S. v. McCann, 940 F.2d 1352, 1358 (10th Cir. 1991)). This necessarily suggests sentencing under the guidelines distinguishes the statutory rule of Crockett so sufficiently that courts no longer need to follow the rule of that case. In a misguided attempt to explain the basis for such a proposition, however, the Court of Appeals limited its analysis to the methodology for determining the base offense level under the guidelines without any reference whatsoever to the statutory framework of § 841(b) and the salient guidelines provision, U.S.S.G. § 5G1.1(a), supra. To that extent, the Court of Appeals explained:

> The sentencing guidelines clearly provide that all relevant conduct should be taken into account at sentencing, U.S.S.G. § 1B1.3, and we have held that drug quantities which were part of the same course of conduct or common scheme or plan as the offense of conviction be

> included in the BOL calculation. U.S. v. Rutter, 897 F.2d 1558, 1562 (10th Cir.), cert. denied, ____ U.S. ____, 111 S.Ct. 88, 112 L.Ed.2d 60 (1990). Thus, quantities of drugs associated with the offenses for which the [Petitioner] is not convicted are properly considered in calculating the BOL. Id. [Citation omitted] ... Thus, we find no error in the district court's consideration of quantities of drugs not alleged in the indictment in calculating [Petitioner's] BOL.

Underwood, 982 F.2d at 429; see also McCann, supra, 940 F.2d at 1357-58. Like McCann, the Court of Appeals in the present case apparently interprets Rutter to stand for the proposition the guidelines contemplate the use of uncharged relevant conduct, after aggregating same in determining the base offense level, to enhance the statutory maximum penalty otherwise authorized by § 841(b) for the offense of conviction as charged. Petitioner concedes if the guidelines do in fact contemplate such use of uncharged relevant conduct, then the statutory rule of Crockett would indeed be inapposite to post-guideline cases.

a. If the Guidelines Do Not Contemplate Such Use of Uncharged Relevant Conduct, Did the Lower Court Err in Constricting Petitioner's Due Process Rights by Declining to Follow Circuit Precedent and Eliminating the Government's Duty to Allege in the Indictment (Count of Conviction) the Predicate

Quantity of Marijuana Necessary to Trigger the Enhanced Statutory Maximum Penalty of Life Under 21 U.S.C. § 841(b)(1)(A)?

Petitioner respectfully submits Rutter, supra does not stand for the proposition for which it is cited, as the Court of Appeals has interestingly taken the Rutter holding completely out of context by relying only upon the portion of Rutter's holding regarding the methodology for determining the base offense level under the guidelines. Cf. U.S.S.G. § 5G1.1(a), supra.

In the factual context of Rutter, supra, the court noted the "maximum statutory penalty" was not "more than forty years" based on the offense of conviction as charged ("distribution in excess of 500 grams of cocaine"). Rutter, 897 F.2d at 1559. And, although the court held the district court properly considered all uncharged relevant conduct in determining the base offense level under the guidelines, id. at 1561-62, the court further explained:

> The Guidelines have changed the incentive to plead guilty because more adverse information is likely to be considered in imposing sentence, but the Guidelines have not eliminated the incentive. [Citation omitted]. Most importantly, a defendant may limit his exposure to incarceration and fines by pleading guilty, because the offense to which the defendant pleads guilty represents maximum exposure, regardless of whether...the negative

> information is part of the relevant conduct which will be considered in determining a more severe guideline range for the offense to which the defendant pled guilty. Guidelines § 1B1.2(b). Stated another way, dismissal of other charges as part of a plea agreement generally will result in a lesser sentence than if the defendant was tried and convicted on all counts.

Id. at 1562 n. 3 (emphasis added). Logically, then, if the guidelines contemplated the use of uncharged relevant conduct, after aggregating same in determining the base offense level, to enhance the statutory maximum penalty otherwise authorized by § 841(b) for the offense of conviction as charged, a defendant could never limit his statutory maximum exposure under § 841(b) by pleading guilty to one § 841(a) offense in exchange for the dismissal of others. Thus, contrary to the Court of Appeals' interpretation of Rutter's holding, Rutter stands for the proposition that the guidelines do not contemplate such use of uncharged relevant conduct. Because the guidelines do not contemplate such use, Petitioner submits sentencing under the guidelines lacks meaningful grounds upon which to distinguish the statutory rule of Crockett.

Consequently, the Court of Appeals' misguided reliance upon Rutter poses an irreconcilable intra-circuit conflict in violation of Petitioner's due process rights. Indeed, consistent with the statutory

rule of Crockett, Rutter stands for the proposition that the statutory maximum penalty as authorized by § 841(b) is based on the offense of conviction as charged, which represents maximum exposure notwithstanding the consideration of any uncharged relevant conduct under the guidelines. Accord U.S.S.G. § 5G1.1(a); U.S. v. Fredrick, 897 F.2d 490, 493 (10th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 171, 112 L.Ed.2d 135 (1990). Cf. U.S. v. Smith, 929 F.2d 1453, 1454-57, 1459 (10th Cir.) cert. denied, ___ U.S. ___, 112 S.Ct. 146, 116 L.Ed.2d 112 (1991). Petitioner respectfully submits, because Rutter lacks meaningful grounds upon which to distinguish the statutory rule of Crockett, the Court of Appeals violated his due process rights by declining to follow circuit precedent and eliminating the government's duty to allege in the indictment (count of conviction) the predicate quantity of marijuana necessary to trigger the enhanced statutory maximum penalty of life under § 841(b)(1)(A).

Moreover, alleging enhancement-triggering quantities in the indictment is necessary to put a defendant on adequate notice at an early stage of the prosecution of the statutory penalty provisions he may face and to provide full notice of the nature of the crimes charged against him. The Court of Appeals' decision violates the notice provisions of the Constitution, which requires defendants receive fair notice of the allegations against them. This appears not once, but twice in the Fifth and Sixth Amendments.

The repetition indicates the significance the Founders attached to the right to receive fair notice of the crime a defendant must defend against. Indeed, this Court recognized as much in Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948), wherein Justice Black wrote for a unanimous Court:

> No principle of due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issue raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Id. See also U.S. v. Ocampo, 890 F.2d 1363, 1373 (7th Cir. 1989), which held:

> The due process clause requires that an indictment provide a defendant with notice of the charge against them.... [Citation omitted.] Rule 7 of the Federal Rules of Criminal Procedure requires that an indictment be a 'plain, concise and definite written statement with the essential facts constituting the offense charged.' Fed. R. Crim. P. 7(c)(1). To satisfy Rule 7 and constitutional requirements an indictment must state all the elements of the offense charged, inform the defendant of the nature of the charge so that he may prepare a defense.... [Citation omitted]. The indictment need not

> cite to an enhanced penalty provision, but instead must only make a defendant aware of the possibility that enhanced penalty provisions could apply.

Id. (emphasis added); accord U.S. v. Zerick, 963 F.2d 1487, 1489 (11th Cir. 1992) (post-guidelines case). Petitioner "recognize[s] that the quantity of narcotics alleged in an indictment is not an element of the offense, but it puts the defendant on notice of the [statutory] penalty provisions he may face, and the quantity may indicate the conduct or transaction that is the basis of the charge." U.S. v. Hernandez, 980 F.2d 868, 871 n. 3 (2nd Cir. 1992) (citation omitted). Because Petitioner's indictment did not adequately inform him of the "nature and cause of the accusation" that would be made against him, it violated the fundamental requirement of notice guaranteed by the Bill of Rights. Such a requirement would have been in line with Tenth Circuit precedent as espoused in Crockett.

Petitioner acknowledges this Court has not considered the precise question of whether the guidelines contemplate the use of uncharged relevant conduct to enhance the statutory maximum penalty otherwise authorized for the offense of conviction as charged. However, every Circuit that has considered the question, after factoring into its analysis the same distinction recognized in Rutter, supra, to inform its judgment, has answered negatively. See U.S. v. Boney,

977 F.2d 624, 646-47 (D.C. Cir. 1992)(Randolph, Circuit Judge, concurring); U.S. v. Concepcion, 983 F.2d 369, 391 (2nd Cir. 1992). Likewise, U.S. v. Davern, 970 F.2d 1490 (6th Cir. 1992) (en banc) factored into its analysis the difference between a charged offense and a sentence enhancement under the guidelines. In its factual context, the Court noted the "[d]efendant was charged with and pleaded guilty to possession with intent to distribute an unspecified quantity of cocaine in violation of 21 U.S.C. § 841(a)(1)." Id. at 1491 (emphasis added). And, in a concurring opinion, Circuit Judge Nelson explained, "Any person who violates § 841(a)(1) in the way defendant Davern did, Congress has declared, 'shall be sentenced to a term of imprisonment of not more than 20 years.' 21 U.S.C. § 841(b)(1)(C)." Id. at 1495. Thus, like Rutter, supra, Davern stands for the proposition that the statutory maximum penalty as authorized by § 841(b) is based on the offense of conviction as charged, notwithstanding the consideration of any uncharged relevant conduct under the guidelines. Id. 970 F.2d at 1491-95; accord Smith, supra.

The effect of the Court of Appeals' position in the present case is to superimpose the incremental sentencing aspects of the guidelines upon § 841(b) by utilizing uncharged relevant conduct from dismissed counts to augment the statutory maximum penalty otherwise authorized for Petitioner's offense of conviction as charged. However, this position clearly

contravenes the guidelines' enabling legislation. The Sentencing Reform Act, which authorizes the guidelines, does not expressly mention or authorize such a relevant conduct system. In 28 U.S.C. § 994(l), Congress does provide for a system that allows "incremental penalties," but limits such penalties to the situation in which the defendant "is convicted of multiple offenses committed in the same course of conduct." 28 U.S.C. § 994(l)(1)(A) (emphasis added). The clear implication is Congress did not intend to authorize incremental statutory penalties when a defendant is convicted only of a single offense during a period of time in which he may also have committed other offenses, if he is not charged and convicted for those offenses. Accord Rutter, supra. Indeed, to this extent, Congress has explicitly provided for a conviction offense sentencing system, which the guidelines accomplish through U.S.S.G. § 5G1.2. See U.S. v. Joetzki, 952 F.2d 1090, 1097 (9th Cir. 1991).

Title 28 U.S.C. § 994(c)(2) may have provided the statutory authority for promulgating the uncharged relevant conduct provisions of the guidelines as some courts suggest, see Davern, supra, 970 F.2d at 1495 n. 6; U.S. v. Galloway, 976 F.2d 414, 419-22 (8th Cir. 1992) (en banc). However, 28 U.S.C. § 994(l) clearly defines the outer limits of relevant conduct in terms of utilizing conduct charged in dismissed counts to form the guideline sentencing calculus. Because the Congressional intent behind 28 U.S.C. § 994(l) is to

limit "incremental [statutory] penalties" to multiple counts of conviction, the relevant conduct provisions appear to have been designed to permit consideration only of offense conduct of which a defendant has not been convicted. Certainly the guidelines cannot be so broadly interpreted as to contemplate the use of uncharged relevant conduct from dismissed counts, after aggregating same for purposes of determining the base offense level, to enhance the statutory maximum penalty otherwise authorized by § 841(b) for Petitioner's offense of conviction as charged. To adopt such a proposition would be to suggest that the Sentencing Commission exceeded the scope of its statutory authority in promulgating the uncharged relevant conduct provisions of the guidelines. This is especially so in the criminal law context where the rule of lenity requires inferring the rationale most favorable to the Petitioner and construing the guidelines and their statutory authority accordingly. See Hughey v. U.S., 495 U.S. 411, 422, 110 S.Ct. 1979, 1985, 109 L.Ed.2d 408 (1990).

In U.S. v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), the court distinguished between "offense conduct" and "offense of conviction." The court defined "offense conduct" as "the totality of the criminal transaction in which the defendant participated and which gave rise to his indictment, without regard to the particular crimes charged in the indictment." Id. at 1209 n. 12. However, the court defined "offense of

conviction" as "the conduct charged in the indictment for which the defendant was convicted." Id. "[O]ffense conduct" is the product of applying the relevant conduct provisions of the guidelines to the "offense of conviction," while the "'offense of conviction' is narrower in scope, referring only to the conduct charged in the indictment for which the defendant was convicted." Id.; accord Hughey, supra, 110 S.Ct. at 1981, 1986.

Thus, the guidelines are intended to provide a narrow sentencing range within the statutory maximum penalty as authorized by § 841(b) for the offense of conviction as charged, see 28 U.S.C. § 994(b)(1) and (2); U.S.S.G. § 5G1.1(a), not to augment that statutory maximum based on uncharged relevant conduct from dismissed counts. See 28 U.S.C. § 994(l); U.S.S.G. § 5G1.2. See U.S. v. Ebbole, 917 F.2d 1495, 1500 (7th Cir. 1990). Accord U.S.S.G. § 5G1.1(a).

Contrary to the Court of Appeals' position in the present case, Petitioner respectfully submits the guidelines contemplate that courts will look to the offense of conviction as charged to set the constitutional parameters of a possible sentence, which is established by a valid conviction on proof beyond a reasonable doubt, before it factors in uncharged relevant conduct from dismissed counts, which is established only by a preponderance of the evidence, to form the guidelines sentencing calculus within those constitutional parameters.

Although this Court has not considered the precise question, analogous pre-guidelines cases from this Court support Petitioner's position and the positions of every other Circuit that has considered the question. During an extensive analysis, guided by this Court's holding in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), an en banc panel of the Eighth Circuit recently held it is constitutionally permissible to factor uncharged conduct into the sentencing calculus, but did so only after concluding the guidelines do not supersede the statutes. Galloway, supra, 976 F.2d at 424.

Also guided by this Court's holding in McMillan, supra, an en banc panel of the Ninth Circuit recently held, when utilizing uncharged relevant conduct, due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the guidelines. The Ninth Circuit also recognized the guidelines do not supersede the statutes. U.S. v. Restrepo, 946 F.2d 654, 657 (9th Cir. 1991) (en banc) (Restrepo II) (footnote omitted); see also U.S. v. Sanchez, 967 F.2d 1383, 1385 (9th Cir. 1992).

Thus, as the en banc courts in both Galloway and Restrepo have significantly recognized: while this Court has historically ruled a sentencing court may consider uncharged relevant conduct, it has consistently focused on the statutory maximum as a

fixed constitutional limit that must not be violated during sentencing, which "do[es] not change even in the context of the Guidelines." Restrepo II, 946 F.2d at 657 n. 4; Galloway, 976 F.2d at 423-24; accord Boney, supra, 977 F.2d at 645-46. See also Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949); U.S. v. Grayson, 438 U.S. 41, 49, 98 S.Ct. 2610, 2615, 57 L.Ed.2d 582 (1978); McMillan, supra, 477 U.S. at 88-90, 106 S.Ct. at 2417-18.

Although the guidelines now provide the methodology for determining sentences, the decisions of the Circuits noted above, as well as the analogously applicable pre-guidelines decisions of this Court, all stand for the proposition that the guidelines do not contemplate the use of uncharged relevant conduct, after aggregating same for purposes of determining the base offense level, to enhance the statutory maximum penalty otherwise authorized by § 841(b) for the offense of conviction as charged. Because the guidelines do not contemplate such use of uncharged relevant conduct, sentencing under the guidelines lacks meaningful grounds upon which to distinguish the statutory rule of Crockett, supra.

The Court of Appeals has thus violated Petitioner's due process rights by declining to follow the Circuit precedent of Crockett. Moreover, requiring the enhancement-triggering quantities to be alleged in the indictment would avoid the scope of statutory authority questions noted above, and any constitutional questions

also noted herein.

b. If the Guidelines Do Contemplate Such Use of Uncharged Relevant Conduct, Does Its Extreme Quantitative Effect on Petitioner's Sentence Require Heightened Procedural Protection Under the Fifth and Sixth Amendments to the United States Constitution?

If the Guidelines do contemplate the use of uncharged relevant conduct from dismissed counts, after aggregating same for purposes of determining the base offense level, to enhance the statutory maximum penalty otherwise authorized by Section 841(b) for the offense of conviction as charged, Petitioner respectfully submits this enhancement factor makes the historical practice of considering uncharged relevant conduct in sentencing unconstitutional because it requires imposing a sentence outside "the [statutory] range already available to it." McMillan, supra, 477 U.S. at 88, 106 S.Ct. at 2417. This Court has recognized when the sentencing system changes, the nature of the applicable constitutional limitations may also change. Id. 477 U.S. at 88-91, 106 S.Ct. at 2417-19 (citing Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967)). In light of the extreme quantitative effect this enhancement factor has on Petitioner's sentence, he respectfully urges fundamental principles of due process require it be treated as an element of the offense, or at least require a higher standard of proof than a mere

preponderance of the evidence in determining its applicability. Petitioner argued same on appeal.

In response, the Court of Appeals noted: "We have already squarely rejected this argument." Underwood, 982 F.2d at 429. The Court of Appeals also noted this Court "has recognized that there is no right to jury trial on sentencing factors." Id. at 429-30. Petitioner's statutory maximum sentence, however, was dramatically enhanced from five years under § 841(b)(1)(D) for his offense of conviction as charged to life under § 841(b)(1)(A) based on uncharged relevant conduct from dismissed counts. Cf. Specht, supra, 386 U.S. 608-10, 87 S.Ct. at 1211-12. The Court of Appeals failed to recognize what this Court recognized in McMillan, that there may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction. 477 U.S. at 87-91, 106 S.Ct. at 2416-18.

In allowing uncharged relevant conduct to be utilized to enhance the statutory maximum penalty otherwise authorized by § 841(b) for the offense of conviction as charged, the guidelines encounter the due process mandate of In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), that elements of a crime must be proved beyond a reasonable doubt. In McMillan, supra, this Court applied Winship in the context of sentencing proceedings. In determining the

constitutionally permissible standard of proof for sentencing factors that "provide sentencing courts with additional guidance" without altering the statutory maximum for the offense of conviction, this Court distinguished between traditional sentencing factors that may be proved by a mere preponderance and sentencing factors that must be proved beyond a reasonable doubt because they constitute elements of a crime. McMillan, 477 U.S. at 87-88, 89, 92, 106 S.Ct. at 2416-17, 2419. "[I]n certain limited circumstances, Winship's reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." Id. at 86, 106 S.Ct. at 2416. Such circumstances exist in the present case.

It is Petitioner's position that facts altering the statutory maximum penalty otherwise authorized for the offense of conviction as charged be found beyond a reasonable doubt at trial. See Jordan v. United States District Court for the District of Columbia, 233 F.2d 362, 366 (D.C. Cir.), vacated on other grounds sub nom. Jordan v. United States, 352 U.S. 904, 77 S.Ct. 151, 1 L.Ed.2d 114 (1956). See also Schad v. Arizona, ___ U.S. ___, 111 S.Ct. 2491, 2504 n. 9, 115 L.Ed.2d 555 (1991); McMillan, supra, 477 U.S. at 86-91, 106 S.Ct. at 2416-19; Mullaney, supra, 421 U.S. at 697-98, 95 S.Ct. at 1888-89; Specht, supra, 386 U.S. at 609, 87 S.Ct. at 1212; Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed.2d 4 (1954).

Petitioner respectfully submits review should be

granted for the above specified reasons.

3. **Whether the Lower Court Erred in Holding the District Court Did Not Abuse Its Discretion in Failing to Depart Downward From the Sentencing Guidelines Due to the Mitigating Circumstance of Unjustifiably Disparate Sentences between Petitioner and his codefendants?**

Petitioner respectfully submits the Court of Appeals has violated his due process rights because its decision is contrary to other decisions of the same court on the issue of departure to remedy unwarranted sentencing disparities among similarly situated defendants. The Court of Appeals has endorsed a violation of Petitioner's due process and equal protection rights.

Petitioner requested a downward departure to remedy two types of unwarranted sentence disparity: unique and unjust. The former type of disparity resulted from the unique situation where Petitioner was sentenced under the guidelines while two of his codefendants were sentenced under pre-guidelines standards. See U.S. v. Ray, 930 F.2d 1368, 1372 n. 7 (9th Cir. 1990); U.S. v. Boshell, 952 F.2d 1101, 1107-09 (9th Cir. 1991). The latter type of disparity resulted from the unjust situation where another codefendant was allowed to plead guilty to Count II only and receive the maximum five year sentence despite the fact the presentence report found both he and Petitioner were equally culpable. See U.S. v. Nelson, 918 F.2d 1268, 1271-73

(6th Cir. 1990); U.S. v. Sardin, 921 F.2d 1064, 1067 (10th Cir. 1990).

The district court stated:

> The defendant seeks a downward departure because some of his codefendants received pre-guideline sentences. He points to the sentences of two codefendants as support for this argument. We find no merit to the argument of the defendant based on the facts of this case. We do not believe that the particular circumstances of this defendant, when compared to the circumstances of the other codefendants, justify a downward departure. Accordingly, this argument shall also be rejected.

Although the court found departure unwarranted based on the unique disparity situation, it failed to exercise any discretion whatsoever regarding departure based on the unjust disparity situation also described above. Clearly, failure to exercise any discretion at all regarding that aspect of Petitioner's argument constitutes an abuse. Indeed, Petitioner and his codefendant were said to be "equally culpable," yet the codefendant received only a five year sentence while Petitioner received a 235 month sentence.

Moreover, Congress has specifically instructed sentencing courts to "consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar

conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). The Tenth Circuit has "specifically recognized and endorsed this principle." Sardin, supra, 921 F.2d at 1067. Petitioner argued same on appeal and added that courts must give a clear basis for differences in the sentences of codefendants. Id. at 1066-67.

In response, the Court of Appeals relied upon U.S. v. Trujillo, 906 F.2d 1456, 1465 (10th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 396, 112 L.Ed.2d 405 (1990), and held, "A trial court's failure to grant a downward departure based solely on a codefendant's disparate sentence does not constitute an abuse of discretion." Underwood, 982 F.2d at 430. Petitioner respectfully submits the Court of Appeals' reliance on Trujillo is misplaced. Unlike Trujillo's, Petitioner's "disparate sentence challenge is [not] based solely on the lesser sentence imposed on his codefendants." Trujillo, 906 F.2d at 1465. Significantly, the Court of Appeals nas apparently failed to realize Trujillo's argument was deemed so limited because he and his codefendant "were not similarly situated." Id. at 1466-67. Such is not the case with Petitioner, however. as he and his codefendant were said to be "equally culpable." Thus, Petitioner's "case is distinguishable from cases in which disparate sentences were upheld because the disparity was explicable given the facts in the respective record." Sardin, supra, 921 F.2d at 1067 (distinguishing Trujillo).

The Court of Appeals should have relied on Sardin

rather than Trujillo to guide its analysis. Because the very purpose of the guidelines was to eliminate disparity in the sentences of such similarly situated defendants as Petitioner and his codefendant, the district court's failure to exercise discretion in that regard "thwarts the very purpose of the guidelines" and therefore clearly constitutes an abuse. Sardin, at 1067.

Petitioner acknowledges the disparate sentences between him and his codefendants were primarily the result of the prosecutor's charging decisions, resulting from plea bargains. Nevertheless, Petitioner respectfully submits sentencing disparities that result from such determinative factors as a prosecutor's seemingly arbitrary decision to plea bargain favorably with one codefendant and unfavorably with a similarly situated codefendant are "unreasoned" and in violation of his due process and equal protection rights. The Third Circuit has held district courts have the authority to depart on this basis, otherwise it would raise the prosecutor to a position supreme over the district judge vis-a-vis sentencing by virtue of the uncontrolled charging discretion. In U.S. v. Lieberman, 971 F.2d 989 (3rd Cir. 1992), it was held:

> [A] policy statement in the introduction to the Guidelines states that the Sentencing commission 'recognized that a charge offense system has drawbacks' and that 'a sentencing court may control any inappropriate

> manipulation of the indictment through use of its departure power.' U.S.S.G., Ch. 1, Pt. A, (4)(A), Policy Statement (emphasis added). The adjective 'inappropriate' does not necessarily suggest bad intent on the part of the prosecutor, but can apply to prosecutorial zeal that results in charging a particular defendant disproportionately to others similarly situated.

Id. at 998. Thus, Petitioner respectfully submits review should be granted because the disparate treatment by the government is not warranted.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES of America, Plaintiff-Appellee

versus

James Harold UNDERWOOD, Defendant-Appellant

No. 91-3380

United States Court of Appeals

Tenth Circuit

Dec. 24, 1992.

Defendant was convicted in the United States District Court for the District of Kansas, Richard Dean Rogers, J., of one conspiracy count in connection with marijuana growing operation, and he appealed. The Court of Appeals remanded for resentencing, 938 F.2d 1086. On remand, the District Court, imposed guideline sentence, and defendant appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) evidence was sufficient to establish that codefendants possession of firearm was reasonably foreseeable to defendant, as required to enhance defendant's sentence for possession of firearm during drug conspiracy; (2) quantities of drugs not alleged in indictment could be used in calculating defendant's base offense level; and (3) determination of sentencing factors by preponderance of the evidence did not deprive defendant of his Fifth and Sixth Amendment rights of due process and trial by jury.

Affirmed.

Before BALDOCK and KELLY, Circuit Judges,

and BRATTON, District Judge.*

BALDOCK, Circuit Judge.

Defendant James Harold Underwood appeals his guidelines sentence for his drug conspiracy conviction claiming three errors by the district court: (1) application of a two-point upward adjustment for possession of a firearm; (2) inclusion of quantities of marijuana not alleged in the indictment in calculating his base offense level; and (3) refusal to grant a downward departure based on the disparate sentences of his codefendants. We have jurisdiction under 18 U.S.C. § 3742(e)(1), and we affirm.

In November 1989, Defendant was named in eight counts of a twelve count indictment relating to a marijuana growing operation conducted on several farms located throughout seven counties in the State of Kansas between January 1987 to July 1989. In March 1990, Defendant pleaded guilty to one count of conspiracy to plant, grow, harvest, and possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1). The presentence report concluded that the offense involved 8,411 kilograms of marijuana and calculated Defendant's base offense level ("BOL") at 34. See U.S.S.G. §§ 2D1.1(a)(3), (c)(5). The presentence report also concluded that a two-level

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* The Honorable Howard C. Bratton, Senior United States District Judge for the District of New Mexico, sitting by designation.

upward adjustment for possession of a firearm, id. § 2D1.1(b)(1), and a three-level upward adjustment for being a manager or supervisor of an offense involving five or more persons, id. § 3B1.1(b), were appropriate. Finally, Defendant received a two-level downward adjustment for acceptance of responsibility, id. § 3E1.1(a), resulting in a total offense level of 37. In light of Defendant's criminal history category of II, Defendant's guideline range was 235 to 293 months, see id. (Sentencing Table), and the offense carried a mandatory minimum of ten years imprisonment. See 21 U.S.C. § 841(b)(1)(A)(vii). The district court sentenced Defendant to 235 months imprisonment, the minimum term within the guideline range.

Defendant appealed his sentence. We held that the district court erred in failing to articulate any reasons for the imposition of the particular sentence as required under 18 U.S.C. § 3553(c). United States v. Underwood, 938 F.2d 1086, 1092 (10th Cir. 1991). We were particularly concerned, in light of the November 1989 amendment to the relevant conduct guideline, U.S.S.G. § 1B1.3, about the district court's application of a two-point firearms possession enhancement. We construed the pre-amendment version of § 1B1.3 as requiring the district court to make a finding regarding scienter before adjusting for possession of a firearm pursuant to § 2D1.1(b)(1). Underwood, 938 F.2d at 1089-90 (citing United States v. Burke, 888 F.2d 862 (D.C.Cir. 1989)). While we

recognized that the November 1989 amendment to § 1B1.3 eliminated the scienter requirement for a firearms possession enhancement, id. at 1090 (citing United States v. Fiala, 929 F.2d 285, 289 (7th Cir. 1991); United States v. Suarez, 911 F.2d 1016, 1021 (5th Cir. 1990)), we held that the ex post facto clause prohibited retroactive application of the amended guideline. Id. The district court's failure to articulate its reasons for the sentence precluded us from determining whether the court had made the requisite finding of scienter. Accordingly, we remanded with instructions to vacate Defendant's sentence and resentence him stating the reasoning behind the calculation of the guideline range and making a finding as to whether defendant knowingly possessed weapons or whether the weapons possession by his codefendants was reasonably foreseeable.[1] Id. at 1092.

On remand, Defendant filed a resentencing memorandum claiming, not only that the § 2D1.1(b)(1) firearms possession enhancement should not be applied, but also that the indictment's failure to allege the quantity of marijuana involved in the conspiracy precluded the court from sentencing Defendant under

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1 We rejected defendant's second argument that the district court's consideration of hearsay testimony regarding his drug related activities while on release violated due process. Underwood, 938 F.2d at 1092 n. 4.

the enhanced penalty provisions of 21 U.S.C. § 841(b), and that the court should grant Defendant a downward departure due to the disparate sentences of his codefendants. Following an evidentiary hearing, the district court found that the government had demonstrated by a preponderance of the evidence that Defendant was aware of his codefendants' firearms possession, and that his codefendants' firearms possession was reasonably foreseeable. The district court also rejected Defendant's argument relating to the enhanced penalty provisions of 21 U.S.C. § 841(b), and found that a downward departure was not warranted.

[1,2] We review the district court's factual findings under a clearly erroneous standard, 18 U.S.C. § 3742(e), and will not reverse "unless the court's finding was without factual support in the record, or if after reviewing all the evidence we are left with the definite and firm conviction that a mistake has been made." United States v. Beaulieu, 893 F.2d 1177, 1181-82 (10th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 3302, 111 L.Ed.2d 811 (1990). See also United States v. Goddard, 929 F.2d 546, 548 (10th Cir. 1991). While we give due deference to the district court's application of the guidelines to the facts, 18 U.S.C. § 3742(e), we review legal questions de novo. Goddard, 929 F.2d at 548 (citations omitted).

In Defendant's first appeal, we held that, under the applicable guidelines (i.e., prior to the November 1989 amendment to § 1B1.3), the § 2D1.1(b)(1)

enhancement for possession of a firearm was proper if Defendant himself knowingly possessed a firearm during the drug offense, or was criminally negligent in his unwitting possession, or if a codefendants possession of a firearm during the drug offense was known to Defendant or reasonably foreseeable to him. Underwood, 938 F.2d at 1090. Although the initial presentence report indicated that a loaded firearm was found behind the seat in Defendant's truck and additional evidence to this effect was presented at the evidentiary hearing on remand, the district court did not rely on this firearm as the basis of the § 2D1.1(b)(1) enhancement, apparently due to the lack of evidence concerning Defendant's knowledge of this firearm.[2] Rather, the district court based the § 2D1.1(b)(1) enhancement on the codefendants possession of firearms. In the first appeal, we not only recognized that a § 2D1.1(b)(1) enhancement could be based on a codefendants' possession of a firearm if Defendant knew of his codefendants possession or such possession was reasonably foreseeable by Defendant, Underwood, 938

2 In addition to the evidence about the firearm in defendant's truck, additional evidence was offered at the evidentiary hearing that a firearm was found in a motel room where defendant had been just prior to search by law enforcement officers, as well as a gun found in another truck registered in the name of one of defendant's aliases which was found at one of the farms.

F.2d at 1090; see also U.S.S.G. § 1B1.3(a)(1)(B); id. comment. (n. 2), we also recognized that "reasonable foreseeability of weapons possession by a codefendant may be inferred if the codefendant knowingly possessed the weapon." Underwood, 938 F.2d at 1090 (citing United States v. McFarlane, 933 F.2d 898, 899 (10th Cir. 1991)). The district court found both that Defendant was aware of his codefendants possession of firearms and that such possession was reasonably foreseeable to Defendant.

After reviewing the record, we have difficulty finding any direct evidence of Defendant's knowledge of his codefendants' possession of firearms. Nonetheless, evidence was adduced at the evidentiary hearing that a number of firearms were found at various marijuana farms that Defendant supervised and that Defendant was seen at these farms. More importantly, one of Defendant's coconspirators, Richard Beard, was in possession of a firearm at the time of his arrest which he initially tried to bury but later revealed to law enforcement officers. Moreover, several other loaded firearms were discovered out in the open at one of the farms from where three coconspirators were fleeing at the time of their arrest. Given the codefendants knowing possession of firearms during the conspiracy, we can infer that the codefendants possession was reasonably foreseeable to Defendant. Underwood, 938 F.2d at 1090; McFarlane, 933 F.2d at 899. Because the codefendant's possession was reasonably foreseeable,

Defendant is accountable for this conduct. See U.S.S.G. § 1B1.3(a)(1)(B); Underwood, 938 F.2d at 1090. Therefore, the § 2D1.1(b)(1) enhancement for possession of a firearm during the drug conspiracy was proper.

[4-6] Defendant next contends that the district court erred in enhancing his sentence based on quantities of drugs not alleged in the indictment. Defendant relies on United States v. Crockett, 812 F.2d 626 (10th Cir. 1987), to support his claim that the quantity of drugs involved in the offense must be alleged in the indictment to be considered at sentencing. Accord United States v. Jenkins, 866 F.2d 331, 334 (10th Cir. 1989); United States v. Brandon, 847 F.2d 625, 631 (10th Cir.), cert. denied, 488 U.S. 973, 109 S.Ct. 510, 102 L.Ed.2d 545 (1988). However, Crockett and its progeny are pre-guidelines cases which we have held are "inapposite to post-guideline cases." United States v. McCann, 940 F.2d 1352, 1358 (10th Cir. 1991) (citing United States v. Ware, 897 F.2d 1538, 1542-43 (10th Cir.), cert. denied, 496 U.S. 930, 110 S.Ct. 2629, 110 L.Ed.2d 649 (1990)). See also United States v. Morehead, 959 F.2d 1489, 1510-11 (10th Cir. 1992). The sentencing guidelines clearly provide that all relevant conduct should be taken into account at sentencing, U.S.S.G. § 1B1.3, and we have held that drug quantities which were part of the same course of conduct or common scheme or plan as the offense of conviction be included in the BOL calculation. United States v. Rutter, 897 F.2d 1558, 1562 (10th Cir.),

cert. denied, ___ U.S. ___, 111 S.Ct. 88, 112 L.Ed.2d 60 (1990). thus, quantities of drugs associated with offenses for which the defendant is not convicted are properly considered in calculating the BOL. Id. See also United States v. Ross, 920 F.2d 1530, 1538 (10th Cir. 1990). Moreover, in determining the quantity of drugs that were part of the same course of conduct or common scheme or plan as the offense of conviction, "a sentencing court may look beyond the charges alleged in the indictment...." United States v. Abreu, 962 F.2d 1425, 1437 (10th Cir. 1992). See also United States v. Harris, 903 F.2d 770, 778 (10th Cir. 1990); Ware, 897 F.2d at 1542. Thus, we find no error in the district court's consideration of quantities of drugs not alleged in the indictment in calculating Defendant's BOL.

[7] Defendant also argues that the district court's determination of sentencing factors by a preponderance of the evidence deprived Defendant of his Fifth and Sixth Amendment rights to due process and trial by jury. Defendant's due process argument is that factors critical to sentencing must be determined beyond a reasonable doubt rather than by a preponderance of the evidence standard. We have already squarely rejected this argument. See United States v. Frederick, 897 F.2d 490, 491-93 (10th Cir.) cert. denied, ___ U.S. ___, 111 S.Ct. 171, 112 L.Ed.2d 135 (1990). See also McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (court's consideration of firearms possession

at sentencing which under state law need only be proved by preponderance of evidence did not violate due process). Defendant's Sixth Amendment argument claiming a right to jury trial on sentencing factors is equally unavailing. Neither the quantity of narcotics nor possession of a firearm is an element of the offense for which Defendant was convicted. While the sentencing guidelines account for these factors in calculating the offense level, the Supreme Court has recognized that there is no right to jury trial on sentencing factors. McMillan, 477 U.S. at 93, 106 S.Ct. at 2420 (no right to jury trial on weapon possession which state treated as sentencing consideration). See also McDonald v. Massachusetts, 180 U.S. 311, 313, 21 S.Ct. 389, 390, 45 L.Ed. 542 (1901) (no right to jury trial on habitual offender status which state treated as sentencing factor). Accordingly, we find Defendant's constitutional arguments to be without merit.

[8] Finally, Defendant argues that the trial court erred in refusing to grant him a downward departure based on the less severe sentences received by his codefendants. "The determination of whether a downward departure is warranted and appropriate is committed to the sound discretion of the trial judge." United States v. Bromberg, 933 F.2d 895, 897 (10th Cir. 1991). A trial court's failure to grant a downward departure based solely on a codefendant's disparate sentence does not constitute an abuse of discretion. United States v. Trujillo, 906 F.2d 1456, 1465 (10th Cir.), cert.

denied, ___ U.S. ___, 111 S.Ct. 396, 112 L.Ed.2d 405 (1990).

AFFIRMED.

Appendix B

No. 91-3380 (D.C. No. 89-40038-03)

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee

versus

JAMES HAROLD UNDERWOOD, Defendant-Appellant

ORDER

Entered February 22, 1993

Before: McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, AND KELLY, Circuit Judges, and BRATTON, District Judge.*

*The Honorable Howard C. Bratton, Senior United States District Judge for the District of New Mexico, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellant Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court

who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By (s) Patrick Fisher

Patrick Fisher

Chief Deputy Clerk